Supreme Court, U.S.
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No. 91-1921

In The

Supreme Court of the United States

October Term, 1991

MARK JOSEPH SHOLTIS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court, State of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a property claimant who has received actual notice of a proposed civil forfeiture of his illegally possessed firearms and who has defended against said forfeiture with the aid of counsel has been denied due process of law?

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STATUTES INVOLVED

N.J.S.A. 2C:64-2. Forfeiture procedures; prima facie contraband

Except as provided in N.J.S. 2C:35-21, prima facie contraband shall be retained by the state until entry of judgment or dismissal of the criminal proceeding, if any, arising out of the seizure. Thereafter, prima facie contraband shall be forfeited to the entity funding the prosecuting agency involved, subject to the rights of owners and others holding interests pursuant to section 2C:64-5.

N.J.S.A. 2C:64-5. Seized property; rights of owners and others holding interests

a. Does not apply.

b. Property seized under this chapter shall not be subject to forfeiture if the owner of the property establishes by a preponderance of the evidence that the owner was not involved in or aware of the unlawful activity and that the owner had done all that could reasonably be expected to prevent the proscribed use of the property by an agent. A person who uses or possesses property with the consent or knowledge of the owner is deemed to be the agent of the owner for purposes of this chapter.

c. Does not apply.

STATEMENT OF CASE

On August 9, 1988, Petitioner Mark Joseph Sholtis was stopped for speeding on the New Jersey Turnpike by two State Police troopers. Upon spotting an 18 inch long

machete lying in open view between the driver and passenger, the troopers arrested both individuals for possession of a dangerous weapon and then searched Sholtis's van incident to the arrest. Inside the glove compartment the officers found a loaded .38 caliber handgun; under the driver's seat, they found a loaded .357 magnum revolver, a speed loader containing hollow-point bullets, five cartridges, and a small quantity of marijuana. (A.2).

The petitioner was charged with illegal possession of the various weapons. He secured the services of a criminal defense attorney and made application to the Bergen County Pretrial Intervention Program, a diversionary program in which defendants are supervised by the Probation Department and, upon successful completion, have their charges dismissed. The Bergen County Prosecutor's Office consented to petitioner's participation in the program, but asked that the court order petitioner to sign a weapons release form as a pre-condition to acceptance. (A.2). The defense counsel strongly objected, arguing that since the petitioner could lawfully carry firearms in his home state of Florida, they should be returned to him. *Id*. The court reserved decision on the forfeiture of the firearms, but permitted the petitioner to enter the pretrial intervention program. (A.3). Briefs were requested by the court and duly filed by both parties.

A year and a half later, after the criminal charges had been dismissed, the trial court ruled that the guns must be returned to the petitioner. Although the court found that the State had perfected its application for forfeiture, it ruled against the State on the merits, based primarily on the fact that the petitioner lawfully possessed the firearms in Florida. (A.3).

The State appealed. The Appellate Division upheld the lower court's order, but the New Jersey Supreme Court reversed and ordered the guns forfeited to the State. (A.3).

SUMMARY OF ARGUMENT

The courts of New Jersey accord procedural due process to property claimants in civil forfeiture cases, even when the property is deemed to be contraband by statute. The present petitioner had actual notice, was represented by counsel at a hearing, filed a brief, had an opportunity to raise any issue he desired, and prevailed on the merits in the lower court and at the first appellate level.

ARGUMENT

POINT I

THE DEMANDS OF PROCEDURAL DUE PROCESS WERE FULLY SATISFIED BY THE NEW JERSEY COURTS

Petitioner Mark Joseph Sholtis seeks review based on what he characterizes as a lack of procedural due process in the New Jersey civil forfeiture statute. He maintains that he was deprived of his property without adequate notice or an opportunity to be heard. This contention is meritless, as a review of the procedural history will disclose.

The property in question, two loaded firearms, was seized from petitioner Sholtis at the time of his arrest for

possession of these (and other) weapons in his van. Having secured the services of counsel to defend him on the criminal charges, Sholtis applied for admission into a pretrial diversionary program. At the court hearing on this application, the State consented to the petitioner's acceptance, provided that he forfeit all weapons to the State by signing a release. The petitioner's counsel opposed this condition on the record, stating:

> "Your Honor, I would object to that one condition that he sign a weapons release. He is from the State of Florida. He's from Tallahassee. . . . And the state which allows him to carry a loaded gun is where he's from. I don't think it would be fair for him to sign a weapons release in this situation."[1]

The trial court thereupon ordered the program to accept Sholtis, but, based on defense counsel's arguments, reserved decision on the forfeiture until both sides had submitted briefs. Once briefing had occurred, the court ruled in the petitioner's favor, ordering the weapons returned to him. The State appealed first to the Appellate Division, where the property claimant prevailed, and then to the New Jersey Supreme Court, where the order was overturned.

Accordingly, in the course of the New Jersey proceedings, the property claimant had actual notice; was heard both orally and in writing, with no constraints placed on the issues he might have chosen to pursue; and

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[1] Petitioner omitted this portion of the transcript from the appendix of his petition.

had representation by counsel throughout the proceedings.[2] Moreover, he prevailed on the merits in both lower courts and it was the State which had to seek further review.

Procedural due process mandates "some form of hearing . . . before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed. 2d 18 (1976). Due process " 'is not a technical conception with a fixed content' " but rather " 'is flexible and calls for such procedural protections as the particular situation demands.' " *Id.*, quoting from *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961) and *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d 484 (1972). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Id.*, citation omitted.

The State of New Jersey certainly does not dispute the proposition that procedural due process attaches to civil forfeiture cases. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-680, 94 S.Ct. 2080, 2090, 40 L.Ed. 2d 452 (1974). We part company from the present petitioner, however, when he focuses on purported procedural deficiencies in one portion of our forfeiture statute, rather than examining the whole statute or seeing how it works in practice. First, the petitioner has disregarded that portion of the statute which provides that *prima facie* contraband will only be forfeited subject to the

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[2] Petitioner chose to proceed *pro se* in the Appellate Division, but was represented by his original counsel in the New Jersey Supreme Court.

rights of innocent owners. N.J.S.A. 2C:64-2 and N.J.S.A. 2C:64-5. Second, and even more important, the New Jersey Supreme Court has clearly articulated our state's approach to the due process issue:

> We note that a forfeiture statute need not provide for procedural due process. In this State, the judiciary itself has the constitutional power to provide for the demand of procedural due process, whatever they may be. *Farley v. $168,400.97*, 55 N.J. 31, 43n.5, 259 *A*.2d 201 (1969) [citation omitted].

This policy statement guides our approach to civil forfeiture cases; it also explains why the present case was surrounded by procedural protections even though the statute does not require the State to initiate a formal civil proceeding.

The present petitioner argues, however, that he never had an opportunity to challenge the search which led to the discovery of the firearms. This is clearly untrue. The petitioner was invited to write a brief at the trial level raising any issues he cared to raise. Had he argued that the weapons were illegally seized, he would have been given an opportunity to be heard, although his chances for success based on substantive law were rather dubious. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 3487, 81 L.Ed. 2d 778 (1984) and *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L.Ed. 2d 170 (1965) [Items such as the firearms involved herein are contraband *per se* – as opposed to derivative contraband – and are forfeited regardless of the exclusionary rule because their mere possession constitutes a crime.].

Based on all of the above, the State maintains that the present petitioner was given a full and fair opportunity to be heard by the courts of New Jersey and there is no reason to grant any further review.

CONCLUSION

For the reasons stated herein the petition for writ of certiorari should be denied.

Respectfully submitted,

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